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Public Prosecutor v Hanif Basree bin Abdul Rahman

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–4 OF 2005(W)
ZAKI AZMI PCA, ARIFIN ZAKARIA, NIK HASHIM, HASHIM YUSOFF AND ZULKEFLI FCJJ
28 MARCH 2008

C

Criminal Law — Murder — Circumstantial evidence — Charge based on circumstantial evidence — Whether DNA found in circumstances that may have created suspicion of guilt enough to prove guilt — Whether there was reasonable explanations for existence of DNA in those circumstances — Whether accused should be acquitted and discharged

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The respondent/accused was charged for the murder of his intimate friend, one Noritta bte Samsuddin ('the deceased') on 5 December 2003. At the close of the prosecution's case he was acquitted and discharged by the learned trial judge without being called for his defence. The prosecution's appeal to the Court of Appeal was dismissed and hence this appeal. The body of the deceased, when found by her apartment mates (SP12 and SP28), was facing downwards with her mouth stuffed with two face towels and her hands and legs tied. Wet tissue papers were recovered from a waste paper basket in the room of the deceased. The main issues in this appeal were: (i) whether from the pathologist's and chemist's evidence it could be irresistibly concluded that the accused was the last person to have had sexual intercourse with the deceased and therefore was the one who caused her death; (ii) what could be concluded from the recovery of the wet tissue papers from the waste paper basket in the deceased's room; (iii) whether there was a man with foul body odour present in the room on the night of the incident; (iv) whether there was unknown male who had been referred to as 'unknown male 1'; and (v) whether the two guards on duty at the condominium at that night (SP10 and SP11) did actually see the accused together with the deceased and two Malay couples in a Kancil a few hours before her death.

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Held, dismissing the appeal:

(1) The DNA profile from the swabs taken from part of body of the deceased showed that it belonged to an 'unknown male 1' and did not match the DNA profile of the accused. Further, although the prosecution had introduced the evidence of the man with the foul body

odour, there was not an iota of evidence whatsoever to support its contention that the body of the accused could have given out such an odour after having sexual intercourse with the deceased and having worked hard to tie her hands and her legs. Even the statement by SP28 that the accused did not have such a body odour was not challenged by the prosecution (see paras 4 & 11).

(2) There was nothing to support the contention that the trial judge had erred in rejecting the evidence of SP10 and SP11, with regards to them having seen the accused and the deceased in the early morning of 5 December 2003 (see para 20).

(3) The prosecution's case was based on the discovery of the DNA of the deceased, accused and the 'unknown male 1'. The DNA profile of a person could only belong to that person and that person only. Therefore it was only when a person was identified and the DNA matched that of the identified person could it be of any use towards solving a crime investigation. But even then the prosecution needed to go one step further to show that the DNA of the suspect (together with any other evidence) was such that it pointed to one conclusion only, ie that the offence was committed by the suspect (see para 22).

(4) The DNA of the accused found in circumstances that might have created suspicion of his guilt was not enough to prove his guilt. If there were reasonable explanations as to why his DNA was found in those circumstances, the benefit must be given to him and he must be acquitted and discharged. The prosecution's case became hampered with the existence of the DNA belonging to the 'unknown male 1'. Several inferences could be made from the findings of such evidence on the body of the deceased. The discovery of the DNA profile of the accused on the body of the deceased per se could not be sufficient to conclude that he had caused her death (see paras 24–25).

(5) In the circumstances, the trial judge had correctly examined the evidence adduced before him and had also correctly applied the principles when assessing circumstantial evidence, particularly as in this case, when there was a reasonable likelihood of the existence of another person who could have committed the offence. Thus, the learned trial judge was right in deciding not to call for the defence and acquitting and discharging the accused at the close of the prosecution's case (see paras 34-36); *R v Abbot* [1955] 2 All ER 899 and *Public Prosecutor v Muhamad Nasir Sharuddin & Anor* [1994] 2 MLJ 576 referred.

[Bahasa Malaysia summary

Responden/tertuduh dituduh membunuh teman rapatnya, Noritta bte

Samsuddin ('si mati') pada 5 Disember 2003. Di akhir kes pendakwaan, dia telah dilepaskan dan dibebaskan oleh hakim perbicaraan yang bijaksana tanpa dipanggil untuk membela diri. Rayuan pihak pendakwaan ke Mahkamah Rayuan ditolak dan maka rayuan ini. Mayat si mati semasa dijumpai oleh rakan serumahnya (SP12 dan SP28), tertiarap menghadap ke bawah dengan mulutnya disumbat dengan dua helai tuala muka dan tangan dan kakinya diikat. Tisu basah diambil dari bakul sampah di dalam bilik si mati. Isu-isu utama di dalam rayuan ini adalah: (i) sama ada dari keterangan pakar patologi dan kimia, ia dapat diputuskan dengan jelas bahawa tertuduh adalah orang yang terakhir yang membuat hubungan seks dengan si mati dan oleh itu adalah orang yang menyebabkan kematiannya; (ii) apa yang dapat disimpulkan dari penemuan tisu yang basah dari bakul sampah di dalam bilik si mati; (iii) sama ada terdapat seorang lelaki dengan bau badan yang busuk di dalam bilik tersebut pada malam kejadian; (iv) sama ada terdapat seorang lelaki yang tidak dikenali yang dirujuk sebagai 'lelaki tidak dikenali 1'; (v) sama ada kedua-dua pengawal yang bertugas di kondominium pada malam tersebut (SP10 dan SP11) sebenarnya telah melihat tertuduh bersama dengan si mati dan dua pasangan Melayu di dalam kereta Kancil beberapa jam sebelum kematiannya.

Diputuskan, menolak rayuan:

(1) Profil DNA yang diambil dari bahan uji yang diambil dari bahagian tubuh si mati menunjukkan bahawa ia adalah kepunyaan 'lelaki tidak dikenali 1' dan tidak berpadanan dengan profil DNA tertuduh. Selanjutnya, walaupun pihak pendakwaan mengemukakan keterangan seorang lelaki dengan bau badan yang busuk, tidak terdapat sedikitpun keterangan untuk menyokong hujahnya bahawa badan tertuduh boleh memberikan bau sedemikian selepas membuat hubungan seks dengan si mati dan bekerja keras untuk mengikat tangan dan kakinya. Malahan, kenyataan dari SP28 bahawa tertuduh tidak mempunyai bau badan yang sebegitu tidak ditentang oleh pihak pendakwaan (lihat perenggan 4 & 11).

(2) Tidak ada apa-apa untuk menyokong hujahan bahawa hakim perbicaraan telah tersilap dalam menolak keterangan SP10 dan SP11, berkaitan dengan dakwaan mereka melihat tertuduh dan si mati pada awal pagi 5 Disember 2003 (lihat perenggan 20).

(3) Kes pihak pendakwaan adalah berdasarkan penemuan DNA si mati, tertuduh dan 'seorang lelaki yang tidak dikenali'. Profil DNA seseorang hanya boleh dimiliki oleh orang tersebut sahaja. Oleh itu, hanya apabila orang tersebut dikenalpasti dan DNA berpadanan dengan orang yang dikenalpasti itu, ia berguna dalam menyelesaikan siasatan jenayah. Tetapi, pihak pendakwaan masih perlu mengambil satu langkah

ke depan lagi untuk menunjukkan bahawa DNA tertuduh (bersama dengan keterangan lain) menunjukkan kepada hanya satu kesimpulan sahaja iaitu, bahawa kesalahan tersebut dilakukan oleh tertuduh (lihat perenggan 22).

(4) DNA tertuduh yang dijumpai dalam keadaan yang mungkin mewujudkan rasa syak terhadap kesalahannya tidak mencukupi untuk membuktikan kesalahannya. Jika terdapat alasan munasabah mengapa DNAnya dijumpai dalam keadaan yang sedemikian, faedah harus diberikan kepadanya dan dia mesti dilepaskan dan dibebaskan. Kes pihak pendakwaan terhalang dengan kewujudan DNA milik 'lelaki yang tidak dikenali 1'. Beberapa kesimpulan boleh dibuat daripada penemuan keterangan sebegitu pada mayat si mati. Penemuan profil DNA tertuduh di atas mayat si mati sahaja tidak mencukupi untuk memutuskan bahawa dia telah menyebabkan kematiannya (lihat perenggan 24–25).

(5) Dalam keadaan ini, hakim perbicaraan telah secara betul memeriksa keterangan yang dikemukakan di hadapannya dan telah dengan betul mengaplikasikan prinsip-prinsip apabila menilai keterangan ikut keadaan, khususnya seperti dalam kes ini, di mana terdapat kemungkinan yang munasabah mengenai kewujudan seorang yang lain yang mungkin telah melakukan kesalahan tersebut. Oleh itu, hakim perbicaraan yang bijaksana adalah betul dalam memutuskan untuk tidak memanggil pembelaan dan melepaskan dan membebaskan tertuduh di akhir kes pendakwaan (lihat perenggan 34–36); *R v Abbot* [1955] 2 All ER 899 dan *Public Prosecutor v Muhamad Nasir Sharuddin & Anor* [1994] 2 MLJ 576 dirujuk.]

Notes

For a case on circumstantial evidence, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1155.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301 (refd)
Belhaven & Stenton Peerage (1875–76) 1 App Cas 278 (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Haw Tua Tau v PP [1981] 2 MLJ 49 (refd)
Idris v PP [1960] MLJ 296 (refd)
PP v Hanif Basree bin Abdul Rahman [2007] 2 MLJ 320 (refd)
PP v Ishak bin Hj Shaari & other appeals [2003] 4 MLJ 585; [2003] 3 CLJ 843 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576 (refd)
R v Abbot [1955] 2 All ER 899 (refd)

Legislation referred to

Criminal Procedure Code s 180, 180(1), 180(2), 180(3)
Federal Constitution art 7

Wong Chiang Kiat (Roszianayati Ahmad and Nurulhuda Nuraini Mohd Nor with him) (Public Prosecutors, Attorney General's Chambers) for the appellant.
V Sithambaram (Rajivan Nambiar, Mohd Haaziq Pillay and Robert Devan with him) (Sitham & Associates) for the respondent.

Zaki Azmi PCA (delivering judgment of the court):

[1] The respondent in this appeal who is the accused ('the accused') was charged for the murder of his intimate friend, one Noritta bte Samsuddin ('the deceased') on 5 December 2003 between 1.30am and 4am in an apartment known as D–7–1 Kondominium Puncak Prima, Galeria, Jalan 17, Sri Hartamas, Kuala Lumpur. At the close of the prosecution's case, he was acquitted and discharged by the learned trial judge without being called for his defence. The public prosecutor now appeals to this court against the dismissal of that appeal by the Court of Appeal.

[2] The deceased's body was found by her apartment mates, Kenneth Michael Yap Tiek Huat ('SP12') and his girl friend and roommate, Nor Azora bte Abdul Hamid ('SP28') at about the time mentioned in the charge. She was found facing downwards and with her mouth stuffed with two face towels. Her hands were tied behind her with a black brassiere. Her legs were also tied but with a black electrical cord. Wet tissue papers were recovered from a waste paper basket in the deceased's room by SP29, ASP Shahrul Lailli bin Masduki, the senior investigation officer ('SIO').

ISSUES

[3] The facts of the case were very well spelt out in the judgment of the High Court and that of the Court of Appeal. I do not need to regurgitate them here. I will only refer to those facts that are subject of dispute. Broadly, the main issues are:

(a) whether from the pathologist's and chemist's evidence it can be irresistibly concluded that the accused was the last person to have sexual intercourse with the deceased and therefore was the one who caused her death;

(b) what can be concluded from the recovery of the wet tissue papers from the waste paper basket in the deceased's room by the SIO;

(c) was there a man with foul body odour present in that room on the night of the incident;

(d) was there an unknown male who had been referred to as 'unknown male 1';

(e) whether the two guards did actually see the accused together with the deceased and two Malay couples in a Kancil a few hours before her death.

Pathologist and chemist findings

[4] The deceased's body was taken for post mortem which was carried out by Dr Abdul Halim bin Mansor who was the Director of Institute of Forensic Medicine, Hospital Kuala Lumpur ('SP13'). From the post mortem, the following are what, amongst others, SP13 discovered:

(a) She had died of asphyxia.

(b) The brassiere and the electrical cord were tied to the deceased's hands and feet respectively, after her death.

(c) He discovered hymen tears in the external genitalia of the deceased which must have been caused more than 72 hours before she died.

(d) Tears were also found at the deceased's anus but these tears occurred less than 72 hours before her death. These tears, in his opinion, could have been caused by a blunt object like the penis or finger.

The DNA profile from the swabs taken from this part of the deceased's body showed that it belonged, to use the words of the chemist, Mr Lim Kong Boon, government chemist attached to the Government Chemistry Department, Petaling Jaya (SP14) — 'to an 'unknown male 1". It did not match the DNA profile of the accused.

(e) In the deceased's vagina the pathologist found, '… *terdapat cecair bertakung di dalam vagina si mati dengan banyak. Banyak cecair seperti ini dari pengalaman saya luar biasa …*'. He said the fluid found was the result of ejaculation of semen together with fluid of the deceased.

[5] I now go to the findings of the chemist. According to the chemist ('SP14'), the estimated composition of the DNA extracted from the semen found in the vaginal swab of the deceased is as follows:

(a) major contributor 60–70% which is that of the accused;

(b) the intermediate contributor 20–25% which is that of the deceased; and

(c) the minor contributor of 10–15% which is of the unknown male.

[6] In his opinion, '… based on the DNA result obtained from the mixed semen stains from 'high vaginal swab', normally indicates that the major contributor is the last person to have sex with the victim'. He qualified his opinion by saying that:

> However, this finding or inference is dependant on a number of factors, such as:
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> 1 the volume of semen ejaculated into the vagina;
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> 2 the number of spermatozoa contained in the ejaculated semen; and
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> 3 the lapse of time between the two sexual intercourses where semen were ejaculated into the vagina.

[7] Other relevant exhibits of forensic evidence discovered by the chemist (SP14) were as follows:

(a) Eleven (11) pieces of tissue papers found in the waste paper basket in the deceased's room which contained DNA of the accused and the DNA of the deceased. The prosecution relied heavily on this evidence to support their case. They contend that because the tissue papers were still wet when the tissue papers were found by the SIO, at about 7am that morning and since these tissue papers contained the DNA of the accused, the accused must have been the last person to have sexual intercourse with the deceased. This evidence, according to the prosecution is supported by the other opinion of the chemist (SP14) on the high proportion of the accused's DNA in the fluid found in the vagina of the deceased, which showed that the accused was the last person to have sexual intercourse with the deceased.

(b) The black brassiere that was used to tie the hands of the deceased was found to bear the DNA of unknown male 1.

(c) Finger nail clippings of the deceased's right hand fingers also have the accused's DNA and the finger nail clippings of the deceased left hand fingers had the DNA of the accused as well as that of the unknown male 1.

(d) Strands of hairs recovered from the deceased's comforter and bed sheet also bear the DNA belonging to unknown male 1.

(e) The electrical cord used to tie the deceased's legs had the DNA of the unknown male 1 as well as that of the deceased.

Tissues

[8] At first sight, the wet tissues discovered in the waste paper basket in the deceased's room, subsequently proven to be stained with the semen of the

accused, seem to support the prosecution's case but on closer examination, they do not. The defence rightly pointed out to the court that the tissues were found under a pile of clothings ie, '*… yang pertama ialah sehelai baju tidur, kedua sehelai seluar pendek warna hitam, ketiga satu coli warna beige, keempat segumpal tisu …*'. The tissues were crumpled up together ('segumpal'). In this respect the chemist at the request of the DPP did a test of putting a few drops of semen that he got from his laboratory refrigerator, on a couple of tissue papers. According to him it took between 1 to 1½ hours in an air conditioned room for them to dry up. From this, according to the learned DPP, since a substantial amount of the accused's semen was found on the tissue papers, and still wet, accused must have used these tissue papers not long before they were discovered by the SIO. From the test conducted by the chemist, it is urged by the learned DPP that the accused could have used the tissue papers within 1 to 1½ hours before the tissue papers were found. It appears to me it does not need an expert to know the different effects viz. the tissue papers that were dripped with semen and spread out in an air conditioned room will dry very much faster than if kept in the form of a ball under stack of clothing. There is also no evidence as to the amount of semen used by the chemist in his experiment compared with that found on the contaminated tissues.

The man with the foul body odour/unknown male 1

[9] SP12 and his girl friend cum roommate SP28 arrived at the condominium at about 4am in the early morning of 5 December 2003. On their arrival, they found the door to their apartment locked. When they went in they did not switch on the lights as they had intended to go to bed immediately. SP28 said that on opening the door, '*… ada hidu bau busuk macam bau badan dan keadaan rumah gelap … dan busuk itu daripada mula masuk pintu utama rumah sehingga kawasan meja makan …*'. She then looked for the source of the odour. She was expecting a friend of the deceased to be sleeping in the lounge area. As she was looking for the source of this odour, '*… saya terpandang susuk tubuh orang di sebelah kanan saya, sekali imbas …*'. Ignoring that she proceeded to her room but at this point in time, she noticed that the entrance door which she and her roommate SP12 had earlier locked had been unlocked ('tidak berkunci'). She sensed something was wrong and asked SP12 to call the guard. In the mean time she proceeded to the deceased's room and called out the deceased's name. There was no answer. She went into the room and that was when she discovered the deceased under the blanket in the condition described earlier in this judgment.

[10] Apart from the evidence of SP28 that she saw a glimpse of a man while in the apartment, she testified later she also saw someone putting on his shirt while walking away from the condominium. She called out to the man and the guard. There was no response from either of them. She then went down

to look for the man but to no avail. The same was told by SP12. He further said that he never experienced such body odour before. If, according to the evidence of the prosecution, the accused had been visiting the apartment before and that the body odour belonged to the accused they should have experienced such odour. The prosecution seemed to have accepted the evidence of the SP12 since there was no questioning on this issue.

[11] It must be noted that the evidence of the man with the foul body odour was introduced by the prosecution. Although in his submission the learned DPP attempted to argue that the accused's body could have given out such an odour after having sexual intercourse with the deceased and having worked hard to tie her hands and her legs, there was however not an iota of evidence whatsoever to support his contention. On the contrary SP28 did say that the accused did not have such a body odour. This statement by SP28, (who is the prosecution's witness) was not challenged by the prosecution. Neither was any attempt made by the prosecution to show any disagreement with this evidence of SP28 during examination.

[12] From the evidence so far, we have the person with the foul body odour and the other person who was seen walking away while putting on his shirt. There is no proof that they were one and the same person.

Unknown male 1

[13] The chemist found DNA of an unidentified male person from the deceased's vagina, swab from the deceased's rectum, semen stain on the bolster, the black brassiere, finger nail clippings of the left hand of the deceased, strand of hairs found on the comforter and finally the electrical cord used to tie the legs of the deceased. The chemist referred to this person as the 'unknown male 1'.

Kancil and two Malay couples

[14] Now comes the question whether the accused and the deceased did go up to her apartment after allegedly meeting their friends at the car park earlier to the discovery of the deceased's body.

[15] The prosecution sought to support their case against the accused by adducing evidence of the two guards to the condominium. They were SP10 and SP11. The learned trial judge rejected the evidence of these two witnesses as being unreliable.

[16] SP10 and SP11 were two guards on duty at the condominium that night. According to them, they had seen the deceased and the accused on many occasions at the condominium before.

[17] In his examination in chief, SP10 testified as follows: He said that at about 1am that night, he saw the deceased and the accused going out in front of the guardhouse located next to the road. He saw both of them chatting with two other men and two women. These two couples had come to the condominium in a white coloured Kancil car. The place where they were chatting was sufficiently bright. The Kancil was parked under a street lamp. He saw them chatting for about 10 to 15 minutes. He saw the registration number of the Kancil but could not remember it. After that the accused and the deceased went back into the condominium passing the guardhouse. They went through a small door at the right side of the guardhouse. He saw the accused before 1am that night ie a few hours before the commission of the alleged offence. The accused was wearing jeans with long sleeved white T-shirt with grip cuffs. The deceased on the other hand was wearing short pants up to her knees with a long T-shirt.

[18] During cross examination SP10 clarified that he did not tell the police that he saw the accused and the deceased that night or at any time until 18 December 2003. He only disclosed these facts after 13 days of daily visits to the police station and only after he was arrested and remanded as a suspect. Prior to his arrest he told the police that the last time he saw the accused was on the night of the 4th. According to him after he told the police on 17 or 18 December 2003 that he saw the accused and the deceased on the 5th morning, the police released him.

[19] SP11 gave similar testimony regarding the white Kancil and the two Malay couples. As regards the apparel worn by the accused and the deceased on the night of the incident, SP11 said the accused was wearing blue jeans and grey coloured T-shirt while the deceased was wearing black shorts and singlet. SP11 also did not tell the police of this incident until about 19 December 2003 ie 14 days or so after the incident. Prior to 19 December 2003, SP11 kept telling the police the last time he saw the accused and the deceased walking into the condominium was on 4 December 2003. He was also under arrest and detention when he claimed to have revealed this to the police. He was arrested on 19th and released on 20 December 2003. SP11 was then also accused of having committed the offence. He could not explain when questioned by the defence as to how the accused could have left the condominium if the accused was really there in the morning of

5 December 2003. Cross examination on him was as detailed as that done on SP10. In this respect SP11 confirmed in his re-examination that the accused had to pass him to go out and yet he did not see the accused leaving the condominium that night.

[20] There is nothing to support the contention that the trial judge had erred in rejecting the evidence of SP10 and SP11. In fact reading through the notes of evidence in detail, and for reasons discussed earlier, I am of the view that the judge was right in rejecting the evidence of these two witnesses with regard to them having seen the accused and the deceased in the early morning of 5 December 2003.

DNA AS PROOF OF IDENTITY

[21] The discovery of the use of DNA (deoxyribonucleic acid) has really revolutionised criminal investigations. Its use has assisted in getting convictions of the guilty and release of the innocent.

[22] The prosecution's case is based on the discovery of DNA of the deceased, accused, and the 'unknown male 1'. Simply put, in practice, the DNA profile of a person can only belong to that person and that person only. The likelihood of another person having an identical DNA to him, according to SP14, is in the proportion of, something like, between 1 in 41 million, to 330 x 1018, in 6.2 quintillion (6.2 x 1018) calculated based on Malaysian Malay database depending on the type of specimen. In other words such proof is practically conclusive. But in order to be able to utilise DNA for identification of a person, the person who has that DNA profile must be identified and related to a sample of his body fluid or any other part of his body. An expert in DNA can only say whether the DNA belongs or does not belong to an identified person. DNA found without a suspect is of no use.

[23] Therefore it is only when a person is identified and the DNA matches that of the identified person can it be of any use towards solving a crime investigation. But even then the prosecution needs to go one step further to show that the DNA of the suspect (together with any other evidence) is such that it points to one conclusion only, ie that the offence was committed by the suspect.

[24] In this case, the DNA of the 'unknown male 1' becomes useful only to determine that the DNA belongs to that man. Unfortunately, the identity and therefore DNA of that person was unknown. Perhaps sometime in the future there will be a register of DNA profiles like what we now have of thumbprints which will assist the police to trace the owner. The accused's DNA found in circumstances that may have created suspicion of his guilt is

not enough to prove his guilt. If there are reasonable explanations as to why his DNA was found in those circumstances, the benefit must be given to him and he must be acquitted and discharged.

[25] In this case, the prosecution's case becomes hampered with the existence of the DNA belonging to the 'unknown male 1'. Several inferences could be made from the findings of such evidence on the body of the deceased. The discovery of the accused's DNA profile on the body of the deceased per se cannot be sufficient to conclude that he caused her death. There could be so many explanations why his DNA was found on her body. Bearing in mind the accused's intimate relationship with the deceased, innocent explanations could be given of such findings. The accused is not charged with having intimate relations with the deceased.

CIRCUMSTANTIAL EVIDENCE

[26] Since the prosecution is relying on circumstantial evidence to prove its case it would be pertinent for me to briefly cite the relevant aspect of the law on circumstantial evidence.

[27] Circumstantial evidence is defined in no better words than in the remarks in the case of *Idris v Public Prosecutor* [1960] MLJ 296, which quoted Lord Cairns' in the House of Lords case of *Belhaven & Stenton Peerage* (1875–76) 1 App Cas 278 at p 279:

> My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient but all converging and brought to bear upon the same point and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

[28] The learned trial judge in *Idris v Public Prosecutor* said:

> In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test. If it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.

[29] The Court of Appeal in the present case said (*Public Prosecutor v Hanif Basree bin Abdul Rahman* [2007] 2 MLJ 320 at p 346):

> Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope (see *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307). There is insufficient evidence to connect the respondent with the killing. Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all (see *Idris v Public Prosecutor* [1960] MLJ 96).

[30] Abdoolcader FJ in *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 at p 275 said:

> Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt *(Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306).

[31] The trial judge in this case must therefore view all the evidence before him and decide whether all the evidence taken together is sufficient to prove the offence against which the accused is charged.

BURDEN OF PROOF

[32] The prosecution's gravamen is that the trial judge and the Court of Appeal had placed too heavy a burden on the prosecution at the close of its case. On 31 January 1997, s 180 of the Criminal Procedure Code was amended by requiring the prosecution to make out a prima facie case at the end of its case. Section 180(1), (2), (3) now reads:

> 180 Procedure after conclusion of case for prosecution
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[33] Prior to this amendment, as a result of the decision in *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49, there had been heated discussions on the term prima facie in relation to burden of proof at the close of the prosecution case. After the amendment, the discussions on this subject continued culminating in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 and *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393, both Federal Court judgments. Since then, Parliament has introduced the definition of prima facie. That term is now defined as 'where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction'. The saga of 'the prima facie case' will continue when the curtain rises again in the near future. For now, it is not necessary to go into that subsection since it cannot apply retrospectively to our present case since it affects the substantial rights of the accused. There is nothing to indicate any intention as to its retrospective effect but even if it does, it would run foul of art 7 of the Federal Constitution (see *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 at pp 663–665) and *Public Prosecutor v Ishak bin Hj Shaari & other appeals* [2003] 4 MLJ 585; [2003] 3 CLJ 843 at pp 851–852). At this stage, I should not be expressing any views on its interpretation without the benefit of a full argument.

CONCLUSION

Judgment of the Court of Appeal upheld

[34] I have read through the judgments of the learned trial judge and the Court of Appeal and find that the trial judge had correctly examined the evidence adduced before him and had also correctly applied the principles when assessing circumstantial evidence, particularly as in this case, when there is a reasonable likelihood of the existence of another person who could have committed the offence (see *R v Abbot* [1955] 2 All ER 899 and *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576).

[35] For reasons discussed above, the prosecution has not discharged its burden in this case before us. The most damning evidence against the prosecution was the presence of the man with the foul body odour in the apartment and the scientifically proven DNA of the 'unknown male 1' recovered from the deceased's body which remains unrebutted.

[36] The learned trial judge was right in deciding not to call for the defence at the close of the prosecution and acquitting and discharging the accused at that stage. I dismiss this appeal and affirm the decision of the learned trial judge and that of the Court of Appeal.

A **[37]** My learned brothers Arifin Zakaria, Nik Hashim, Hashim Yusoff and Zulkefli FCJJ, have seen this judgment in draft and have expressed their concurrence.

Appeal dismissed.

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Reported by Sally Kee

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